National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 23, 1998

TO: Rochelle Kentov, Regional Director, Region 12

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Pratt & Whitney, Cases 12-CA-18446, 12-CA-18722, 12-CA-18745, 12-CA-18863

512-5012-0133-1100, 512-5012-0133-5500, 512-5012-1725, 512-5012-1725-8800, 512-5012-1737

These cases were submitted for advice as to whether the Employer can lawfully prohibit all non-business use of electronic mail (E-mail), including employees' messages otherwise protected by Section 7.

FACTS

In October 1995, several employees of the engineering department of Pratt & Whitney (the Employer), located in West Palm Beach, Florida, decided to form the Florida Professional Association (the Union), with the intent of representing for collective bargaining the approximately 2450 professional and technical employees of the engineering department.[(1)] As part of the Union's organizing campaign, the employees sent or forwarded various E-mails to fellow employees, including information addressing such subjects as salaries, layoffs, NLRB procedures, and unionization generally. In addition, the Union established a "web page" and posted organizing information accessible through the Internet. The Union also distributed organizing materials in common non-work areas open to employees, including an engineering department cafeteria and plant entrances.[(2)]

The evidence regarding the Employer's engineering department employees' work is as follows. One employee has attested that he spends 75-80% of his time on the computer. Another employee said that E-mail is the way the employees communicate with one another since they are always at their computer terminals. A third employee stated that E-mail is employees' main method of communicating. Moreover, the Region's Decision and Direction of Election (DDE) indicates that most or all of the employees in the proposed unit(s) do a significant part of their work using computers and may similarly rely upon various network communications in their work. For example, the largest group of workers discussed in the DDE, 1,392 engineering associates, engineers, senior engineers, and project engineers assigned to the engineering core units, is "tasked with the design and development of the Employer's propulsion systems through the application of advanced design methodologies and data acquisition systems." Moreover, the Employer's own policies, which give all of the affected employees access to the Employer's E-mail system while claiming to limit the use of E-mail to only business-related purposes, shows how essential E-mail is to these employees' work. Finally, the importance of computers and E-mail to the employees' work is demonstrated by certain Employer programs. Under these programs, the Employer provides approximately ten percent of employees with lap-top computers to enable them to access their E-mail from outside the Employer's facility, and approves other employees' accessing the Employer's computer network using their own computers. Thus, the employees appear to communicate primarily by E-mail and spend most of their working time on their computers.

The Employer has long had a written policy prohibiting use of the Employer's computer resources for non-business, unauthorized, or personal purposes. This policy has not been strictly enforced with regard to E-mail messages, and employees regularly send each other personal messages and announcements, humorous stories, and other non-business E-mail.

Since August 1996, several of the employees active in the Union's organizing campaign have been warned, suspended, or otherwise disciplined for their use of E-mail for Union messages or because other employees have downloaded information from the Union's web page onto the Employer's computers.[(3)] The Region has determined to issue complaint alleging that the Employer violated the Act by, *inter alia*, disparately and discriminatorily enforcing its policy on computer use, and its no-solicitation rules generally, against Union messages, and that the Employer's no-solicitation rule is overbroad on its face. These

issues have not been submitted to the Division of Advice. The sole question submitted in the instant cases is whether the Region should add an additional allegation that the Employer's policy is facially unlawful because it completely prohibits any use of the Employer's computer resources for employees' messages otherwise protected by Section 7.(4)

ACTION

We conclude that the Employer's prohibition of all non-business use of electronic mail (E-mail), including employees' messages otherwise protected by Section 7, is overbroad and facially unlawful. While the Board has specifically held that an employer may not discriminatorily limit employees' use of E-mail for Section 7 purposes,(5) the Board has not yet ruled upon the legality of a non-discriminatory prohibition of employees' use of E-mail for organizing or other Section 7 messages.(6)

A.Republic Aviation: Principles Regarding Solicitation

The starting point for analyzing this question must be the line of cases involving no-solicitation and no-distribution policies exemplified by the Board's, and the Supreme Court's, decisions in Republic Aviation Corp.(7) and Le Tourneau Co. of Georgia.(8)

In Republic Aviation, the employer discharged an employee for wearing a union steward button while working and for handing out union cards inside the plant during non-working time. The employer's action was based upon a rule prohibiting all solicitation in the plant, which had been promulgated prior to the onset of any organizing activity, and the Board held that the rule was not discriminatorily applied against the union supporters. However, the Board held that the "rule prohibiting union activity on company property outside of working time constitute[d] an unreasonable impediment to self-organization" and was unlawful given the absence of special circumstances or "cogent reason, warranting extension of the prohibition to non-working time, when production and efficiency could not normally be affected by union activity."(9)

In Le Tourneau, the employer suspended two employees for distributing union literature in the employer's plant parking lot, based upon a non-discriminatory application of a no-distribution rule. The Board held the rule to be a unreasonable impediment to organization, given the layout of the area surrounding the plant, which rendered the distribution of literature outside of the employer's property "virtually impossible."(10)

In striking a balance between employer and employee rights, the Board articulated several important principles in these cases, affirmed by the Supreme Court. First, the Board and Court made it clear that an employer's managerial or property rights are not, in themselves, dispositive of the lawfulness of even a non-discriminatory rule. Thus, "[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."(11)

Second, the Board decided that while an employer has a right to expect that employees' working time be for work,(12) an employee equally has a right to use non-working time for activities protected by Section 7, even on the Employer's property.(13) In affirming the Board's analysis,(14)

the Supreme Court in Republic Aviation firmly established the rule that, while employers are rebuttably presumed to act lawfully when they limit employees' right to solicit other employees during working times,(15) prohibitions on employee solicitation during non-working time, even in work areas, are presumed to be unlawful.(16) This presumption of unlawfulness may be overcome if the employer can demonstrate that the restrictions are necessary to maintain production or discipline.(17)

B.Stoddard-Quirk: Solicitation and Distribution Distinguished

Subsequent to Republic Aviation, the Board established a distinction between employer policies limiting employees' solicitation of fellow employees and those that limit the distribution of written materials.(18) In Stoddard-Quirk, the employer discharged an employee, claiming that the employee distributed literature in the employer's parking lot in violation of a rule prohibiting unauthorized distribution of literature on "company premises." The Board held both that the employer's reliance on

the rule was pretextual, and that, in any case, the employer's application of its rule would have been unlawful as the asserted conduct took place in the parking lot and not in any work area of the plant.[(19)]

Stoddard-Quirk is generally cited for the simple proposition that an employer may limit the distribution of written materials in work areas because of a presumed legitimate concern regarding the potential for litter.[(20)] The Board's opinion in Stoddard-Quirk, however, is much more expansive and subtle than that. The Board does rely on the potential for litter as a basis for its holding, but it explicitly stated that, "because [this consideration] presents only one side of the employer-employee equation, it does not wholly resolve the problem."[(21)] Instead, the Board also examined the employees' interests in distributing literature and concluded that the employees' purpose can be satisfied as long as the literature is received by other employees, such as by distribution at plant entrances or in the parking lot. The Board held that, unlike oral solicitation, the permanent nature of written literature allows it to be read and reread at the receiving employees' convenience. This factor obviates the need for employees to be able to distribute the literature throughout the employer's facility because, unlike solicitation, the purpose of distributing the literature is achieved as long as it is received.

The Board's opinion in Stoddard-Quirk also indicates that, in the absence of non-work areas where distribution can take place, the usual presumption permitting an employer to bar distribution in work areas may not apply.[(22)] Finally, the Board in Stoddard-Quirk made it clear that non-work areas must be made available for distribution regardless of other available methods of communication.[(23)]

Thus, after Stoddard-Quirk, the distinction between solicitation and distribution must be defined based on the nature of the employees' interests and purpose in addition to interests of the employer. Where the communication can reasonably be expected to occasion a spontaneous response or initiate reciprocal conversation, it is solicitation; where the communication is one-sided and the purpose of the communication is achieved so long as it is received, it is distribution. If it is solicitation, it must be permitted in all areas in the absence of an overriding employer interest; if it is distribution, it may be prohibited in work areas unless the employees have no available non-work areas.

This helps explain the Board's characterization of the circulation of authorization cards and decertification petitions as solicitation, not distribution.[(24)] Despite the mass-produced, written documents involved, the activity of collecting signatures requires more than mere receipt of documents, as characterizes distribution. Instead, the cards or petitions are only effective if the recipient considers and returns them -- such interchange exemplifies solicitation.

C.Application of Stoddard-Quirk to E-mail

Initially, we conclude that the evidence indicates that the employees in the instant cases use the Employer's computers and computer network in such a way as to make them "work areas" within the meaning of Republic Aviation and Stoddard-Quirk. Engineering department employees have stated that they communicate primarily by E-mail and spend most of their working time on their computers. Moreover, the Region's DDE indicates that most or all of the employees in the proposed unit(s) do a significant part of their work using computers and may similarly rely upon network communications in their work. As noted above, the largest group of workers discussed in the DDE, 1,392 engineering associates, engineers, senior engineers, and project engineers assigned to the engineering core units, is "tasked with the design and development of the Employer's propulsion systems through the application of advanced design methodologies and data acquisition systems," which apparently involves significant computer and network involvement. The Employer's own policies underscore this point, as the Employer gives all of the affected employees access to the Employer's E-mail system (while claiming to limit the use of E-mail to only business-related purposes). The Employer also apparently provides approximately ten percent of employees with lap-top computers to enable them to access their E-mail from outside the Employer's facility and approves other employees' accessing the Employer's computer network using their own computers. Taken together, this evidence is sufficient to demonstrate that, for these employees, their Employer-provided computer networks are work areas since it is on these networks that these employees are productive. Thus, the computers are inextricably intertwined with the physical space these employees occupy and the "virtual space" they access on the various networks to perform their jobs and, as such, are "work areas" within the meaning of Republic Aviation and Stoddard-Quirk.

Given this conclusion, the application of Republic Aviation and Stoddard-Quirk to E-mail communication is straightforward --

the balance of interests has already been struck in those cases. Thus, in the instant cases, the Employer may not prohibit messages that constitute solicitation as there is no evidence of special circumstances that make such a prohibition necessary in order to maintain production or discipline. Moreover, it is clear that at least some E-mail messages sufficiently carry the indicia of oral solicitation to warrant similar treatment. For example, if two of the Employer's employees have an interactive E-mail "conversation" in real time regarding the Union's organizing campaign, or some collective grievance, when both employees are not on work time, this cannot be meaningfully distinguished from any other verbal solicitation.

Indeed, it has been widely recognized that at least some E-mail messages are not merely analogues of printed written messages; rather, they have been characterized as "a substitute for telephonic and printed communications, as well as a substitute for direct oral communications."[(25)] There has even been Congressional recognition that E-mail "is interactive in nature and can involve virtually instantaneous 'conversations' more like a telephone call than mail."[(26)] As one observer has commented:

Like speech, e-mail is often informal and individually targeted. But even where an initial message is neither informal nor personalized, it is still not merely equivalent to a flyer because e-mail allows the reader to talk back. This ability to exchange ideas and discuss what action to take collectively is the key to the effective preservation of labor rights and the equalization of bargaining power. Conversation provides the opportunity to meet the listener's resistance point by point as it develops, producing fuller deliberation about issues as well as a better chance of swaying the skeptic than does the more limited and formal medium of distribution. Likewise, electronic communication promotes responsive interchanges, not just an exchange of position papers. . . . Thus, electronic communications promote a multiplicity of interchanges and, on the level of values, resemble speech more than distribution of literature.[(27)]

On the other hand, from the employer's perspective, at least some E-mail may seem more like the printed documents classified as distribution.[(28)] While E-mail does not cause the physical litter problems that written literature can create, it can take up "cyberspace" and thus has the potential to affect the performance of an employer's computer network. Moreover, even if the message is composed and sent on the sender's non-working time, it may well appear during the recipient's working time, thereby possibly causing disruption and affecting production.[(29)]

Despite these legitimate employer concerns, we conclude that at least some E-mail nevertheless warrants treatment as oral solicitation. An employer rule prohibiting such solicitation, under the analysis approved in Republic Aviation, should be presumed unlawful in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. Significantly, the Republic Aviation presumption does not consider the availability of alternative means of communication between employees. Thus, if some E-mail is properly classified as solicitation, the Employer's rule is unlawfully overbroad regardless of the ability of employees to otherwise converse, or to distribute literature in non-work areas. A minimal burden placed upon an employer's computer network by such electronic traffic does not constitute special circumstances making the rule necessary to maintain production or discipline, and it should not outweigh the employees' Section 7 interests.

In the instant cases, of course, the Employer's rule prohibits all non-business use of E-mail, including solicitation messages protected by Section 7. Thus, based upon the above analysis, it is overbroad regardless of whether a less restrictive rule might be lawful. Therefore, we conclude that the Employer's rule at issue herein is facially unlawful.

Finally, we note that, given the breadth of the Employer's rule, we are not presented in the instant cases with the full panoply of issues that may arise in future cases. For example, our conclusion does not rest on a finding that all E-mail messages must necessarily be treated as solicitation. Given the breadth of the Employer's rule in the instant cases, which prohibits all non-business use of E-mail, we need only determine that there are some messages that cannot be prohibited; we need not decide whether there is an E-mail equivalent to "distribution" or determine the precise boundaries of any such categories.

Another set of issues that is not presented in the instant cases but that might arise in later cases involves definitions of working time with regard to employee use of employer computer resources. While working time has always been somewhat difficult to exactly define, the lines between working time and non-working time may be even more blurred and doubtful with regard to professional and quasi-professional employees whose work involves extensive use of computers.[(30)] The times (and places) in

which these employees perform their work may be far more flexible and fungible than those of the industrial factory employees at issue in Republic Aviation. However, this question is not implicated in the instant cases, as the Employer has not limited its rule to employees' working time, nor has it imposed the disciplinary actions at issue because of any claimed misuse of working time.

Finally, we need not address here: (1) employees' use of employer electronic "bulletin board" systems;[(31)] (2) non-employee access to E-mail addresses maintained by the Employer (all of the individuals involved with the Union herein are also employed by the Employer); or (3) reasonable rules limiting E-mail to narrowly address particular problems, such as rules which only prohibit "mass" distribution of non-business E-mail massages,[(32)] which require that any non-business E-mail message include "non-business" in the title of the message, or which require that any non-business E-mail message must be sent by lowest priority or otherwise treated so as to limit its interference with business-related E-mail. These issues may be significant in other contexts, but are not raised in any way by the instant cases.[(33)]

Accordingly, the Region should add a complaint allegation in the instant cases alleging that the Employer violated Section 8(a)(1) by prohibiting employees from using E-mail to send messages otherwise protected by Section 7.

B.J.K.

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[1] A representation election was held on May 29, 1997. The ballots from that election have been impounded, pending Board review of the Regional Director's Decision and Direction of Election.

[2] The Region has determined to issue complaint alleging that the Employer violated the Act by interfering with such distribution based upon an unlawfully overbroad no-solicitation rule.

[3] After the employees were disciplined, the Union placed a message on its web page urging employees not to use the Employer's computers to download Union information or to correspond with other employees, but instead to use personal computers at home.

[4] As set forth more fully below, we emphasize that the instant cases present a very limited issue, i.e., the sole question of whether an employer can issue a complete ban on all non-business use of E-mail. The Employer has set forth no exceptions to the rule, nor has the Employer demonstrated, or even articulated, any special circumstances supporting the prohibition.

[5] E. I. du Pont & Co., 311 NLRB 893, 919 (1993).

[6] This issue was not presented to the Board in du Pont; it was not alleged in the complaint in that case, and it remains an open question. We note that in du Pont, the Board granted the employer/respondent's motion (agreed to by the General Counsel) to limit the ALJ's proposed remedy, which would have required the employer in that case to cease and desist "[p]rohibiting bargaining unit employees from using the electronic mail system for distributing union literature or notices." Instead, the Board ordered the employer to cease and desist "[d]iscriminatorily prohibiting bargaining unit employees from using the electronic mail system for distributing union literature or notices." We conclude that this change does not reflect any Board opinion as to the lawfulness of a non-discriminatory prohibition, however, as it merely corrects the order to match the violation alleged by the General Counsel and found by the administrative law judge and the Board.

[7] 51 NLRB 1186 (1943), enfd. 142 F.2d 193 (2d Cir. 1944), affd. 324 U.S. 793 (1945).

[8] 54 NLRB 1253 (1944), enf. denied 143 F.2d 67 (5th Cir. 1944), reversed 324 U.S. 793 (1945).

[9] 51 NLRB at 1187.

[10] 54 NLRB at 1261. Significantly, the Board foreshadowed its decision in Stoddard-Quirk Mfg. Co., discussed below, by noting that, while the Board had previously held that concerns regarding litter might support the reasonableness of rules limiting distribution inside plant premises, this did not seriously impede organization, "since the employees could effectively distribute literature at the plant gates." Ibid.

[11] 324 U.S. at 802 n.8 (noting the Board's quotation from NLRB v. Cities Service Oil Co., 122 F.2d 149, 152 (2d Cir. 1941)).

[12] "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work." Id. at 803 n.10, quoting Peyton Packing Co., 49 NLRB 828, 843 (1943).

[13] "It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property." Id. at 803-04 n.10.

[14] The Board's analysis, and the presumptions utilized therein, were first articulated by the Board in Peyton Packing, 49 NLRB at 843-44.

[15] "It is . . . within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose." 324 U.S. at 803 n.10.

[16] "It is . . . not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." Id. at 803-04 n.10.

[17] Ibid.

[18] Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962).

[19] Id. at 623.

[20] The Board's acknowledgment of the legitimacy of an employer's concern regarding litter long predated Stoddard-Quirk and the Board's formulation of the solicitation/ distribution dichotomy. See, e.g., Tabin-Picker & Co., 50 NLRB 928, 930 (1943); Frank W. Vanderheyden, "Employee Solicitation and Distribution -- A Second Look," 14 Labor Law Journal 781, 786 (1963), and cases cited therein.

[21] 138 NLRB at 619.

[22] Id. at 621 ("organizational rights . . . require only that employees have access to nonworking areas of the plant premises").

[23] Id. at 622.

[24] See, e.g., Rose Co., 154 NLRB 228, 229 n.1 (1965); Southwire Co., 145 NLRB 1329 (1964).

[25] In Re: Amendments to Rule of Judicial Administration, 651 So. 2d 1185 (Fla. Sup. Ct. 1995).

[26] H.R. Rep. No. 647, 99th Cong., 2d Sess. at 22, discussing the Electronic Communications Privacy Act of 1986.

[27] Elena N. Broder, Note, "(Net)workers' Rights: The NLRA and Employee Electronic Communications," 105 Yale Law Journal 1639, 1662 (1996).

[28] See, e.g., Donald H. Seifman & Craig W. Trepanier, "Evolution of the Paperless Office: Legal Issues Arising out of Technology in the Workplace," 21 Employee Relations Law Journal 5, 25 (Winter 1995/96), quoting Frank C. Morris, Jr., "E-Mail Communications: The Next Employment Law Nightmare," C108 ALI-ABA 623, 630 (June 1, 1995).

[29] We also note a concern that has been raised as a presumably legitimate motivation for banning non-business E-mail, but which has not been raised by the Employer in the instant cases -- potential employer liability for sexual or racial harassment. See, e.g., Seifman & Trepanier, 21 Employee Relations Law Journal at 19-21. In any case, such concerns are more appropriately addressed by a narrowly limited ban, so as not to override the important employee rights protected by Section 7. Thus, a clear harassment policy or a ban with an exception for messages concerning unionization or other types of mutual aid and protection would meet the required standard, properly balancing employer and employee interests.

[30] See, e.g., Broder, *supra*, 105 Yale Law Journal at 1659-1660 ("many of the assumptions underlying the traditional presumptions are frequently no longer true . . . Thus, for many [computer users], the nonwork-time presumption is essentially meaningless").

[31] In this regard, we note that the Board has clearly stated that employees do not have a right of access to employer bulletin boards in the absence of discrimination. See, e.g., J. C. Penney, Inc., 322 NLRB 238 (1996) ("An employer has the right to restrict the use of company bulletin boards"); Honeywell, Inc., 262 NLRB 1402 (1982), and cases cited therein. This dissimilar rule sheds little light on the issue of E-mail since, in contrast to E-mail, employees do not generally have access to employer bulletin boards in the performance of their work, but it may have more relevance in analyzing asserted access rights to electronic bulletin boards.

We further note, however, that when the Board limited the remedy ordered in du Pont, as discussed *supra*, it cited a case involving a discriminatory ban on bulletin board postings. Storer Communications, 294 NLRB 1056, 1099 (1989). We believe that this citation was not intended to signify that the Board saw any analogy between bulletin boards and E-mail. Storer was originally cited by the General Counsel merely as an example of a case involving discriminatory application of an employer's rule, and there was no indication in that citation, nor in its repetition by the employer or the Board, that it had any significance beyond that limited purpose.

[32] We note that, as part of the discipline it imposed in the instant cases, the Employer did require one employee to get a supervisor's approval before sending any E-mail message to a "distribution list" of ten or more addresses. As this limit was discriminatorily imposed on only one employee, as it was based upon the unlawfully overbroad rule, and as none of the employees appears to have been disciplined for the amount of E-mail sent, we conclude that these cases are not a vehicle to consider the lawfulness of a reasonable rule limiting excessive

distribution of E-mail as a matter of production or discipline.

[33] [*FOIA Exemption 5*

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